LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 7 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961.

#11/1963

No. [redacted]

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

EPHRAIM LONDON,
Attorney for Appellant,
1 East 44th Street,
New York 17, New York.

INDEX.

	PAGE
OPINIONS IN THE COURTS BELOW	1
THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED	1
THE QUESTIONS PRESENTED BY THE APPEAL	3
The Material Facts of the Case	4
HOW THE FEDERAL QUESTIONS WERE RAISED	5
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	6
1. Section 2905.34 of the Ohio Revised Code on its face and as applied in this case violates the Federal Constitutional guarantees of freedom of communication because it punishes the mere private possession of obscene material, without regard to the nature and purposes of the possession	8
2. Section 2905.34 of the Ohio Revised Code as interpreted and applied in this case violates the Federal Constitutional guarantees of freedom of communication because it provides for punishment of one who possesses or exhibits obscene material though he may not know the material is obscene, and may have cogent reasons for believing that the material is not obscene	12
3. The trial court in convicting Appellant, and the court below in affirming the conviction, of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those outlined in *Alberts* v. *California*, 354 U. S. 476 and punished Appellant for dealing with a film within the protection of the First and Fourteenth Amendments of the Constitution	14

PAGE

4. Appellant was convicted and punished twice under Section 2905.34 for the same offense in violation of the guarantees of the Fourteenth Amendment 17

5. Section 2905.34 as modified by related statutes denies equal protection of the laws and authorizes punishment without due process of law.... 17

6. Section 2905.34 of the Ohio Revised Code on its face infringes the right of communication protected by the First and Fourteenth Amendments and is void for vagueness under the Due Process Clause of the Fourteenth Amendment in making it a felony knowingly to possess or exhibit an "obscene" motion picture 19

APPENDIX A—Majority Opinion of The Supreme Court of Ohio and Concurring and Dissenting Opinion 1a

APPENDIX B—Memorandum Opinion of Court of Common Pleas, Criminal Division..... 11a

APPENDIX C—Order Appealed From..... 13a

APPENDIX D—Statutes Involved..... 14a

Ohio Revised Code,

Section 2905.34. Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes 14a

Section 2905.342. Exhibition of obscene movies prohibited; movies inciting disorder or violation of laws prohibited..... 15a

Section 2905.37. Legitimate publications not obscene 15a

Section 3767.01 (in effect at the time of Appellant's conviction). Definitions..... 16a

TABLE OF CASES.

	PAGE
Alberts v. *California*, 354 U. S. 476	2, 14
Burstyn v. *Wilson*, 343 U. S. 495	2, 15
City of Cincinnati v. *King*, 11 Ohio Ops. 2d 433	18
Cole v. *Arkansas*, 338 U. S. 345	7
Grove Press, Inc. v. *Christenberry*, 276 F. 2d 433 (2d Cir. 1960)	15, 16
Hebert v. *Louisiana*, 272 U. S. 312	11
Jones v. *Opelika*, 316 U. S. 584, 600, dissenting opinion, adopted by the Court on rehearing, 319 U. S. 103	18
Lambert v. *California*, 355 U. S. 225	12
Lange, Ex parte, 85 U. S. 163	17
Lanzetta v. *New Jersey*, 306 U. S. 451	2, 11
Mapp v. *Ohio*, 364 U. S. 868 (Mem.)	10
Mapp v. *Ohio*, 367 U. S. 643	2, 6, 9, 10
Nielson, In re, 131 U. S. 176	17
One, Inc. v. *Oleson*, 355 U. S. 371	15
Roth v. *United States*, 354 U. S. 476	7, 8, 15, 16, 17, 18, 19
Smith v. *California*, 361 U. S. 147	2, 7, 12, 14, 15, 17, 19
State v. *Mapp*, 170 Ohio St. 427	8, 9, 10, 11
Sunshine Book Co. v. *Summerfield*, 355 U. S. 372	15
Sweezy v. *New Hampshire*, 354 U. S. 234	12
Times Film Corp. v. *City of Chicago*, 355 U. S. 35	15
Wieman v. *Updegraff*, 344 U. S. 183	12
Winters v. *New York*, 333 U. S. 507	7

CONSTITUTIONAL PROVISIONS AND STATUTES.

PAGE

United States Constitution,
Article 1, Section 10 11
First Amendment 3, 9, 14, 15, 19
Fourteenth Amendment 3, 4, 9, 10, 14, 15, 17, 19

Title 28, U. S. C.,
Section 1257(2) 2

Ohio Revised Code,
Section 2905.34 ..... 2, 3, 8, 9, 10, 12, 13, 14, 17, 18, 19
Section 2905.37 ..... 17, 18
Section 3767.01(c) 17, 18

MISCELLANEOUS.

Kalven, Metaphysics of the Law of Obscenity, in The Supreme Court Review 11-13 (Univ. of Chicago Press, 1960) 16

Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 15

Lockhart and McClure, Obscenity Censorship: The Constitutional Issue—What is Obscene, 7 Utah L. Rev. 289 15

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

STATE OF OHIO,
Plaintiff-Appellee,

against

NICO JACOBELLIS,
Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

(a) Reports of the Opinions in the Courts Below.

The opinions of the Supreme Court of the State of Ohio in this case are reported in 173 Ohio St. 22, and 179 N. E. 2d 777, and are set forth in full in Appendix A. The opinion of the Court of Appeals for Cuyahoga County, State of Ohio, in this case is reported in 175 N. E. 2d 123. The opinion of the Court of Common Pleas for Cuyahoga County (Criminal Division), State of Ohio, is not reported. It is set forth in full in Appendix B.

(b) The Grounds On Which Jurisdiction Of The Supreme Court Of The United States Is Invoked.

(i) Appellant was convicted under Section 2905.34 of the Revised Code of Ohio of the crimes of (1) "knowingly" having in his possession or under his control an "obscene" motion picture film and (2) of "knowingly" exhibiting an

"obscene" motion picture film. The film involved in both charges was "The Lovers."

The appellant was sentenced to pay a fine of $500.00 on the first count of the indictment and was sentenced to pay a fine of $2,000.00 on the second count and to stand committed to the workhouse of the City of Cleveland until such fine and costs were paid. Sentence has been stayed pending this appeal.

(ii) The judgment sought to be reviewed is the judgment of the Supreme Court of the State of Ohio, entered January 17, 1962, which affirmed Appellant's conviction of possessing and exhibiting an obscene film bearing the title, "The Lovers". The judgment of the Supreme Court of the State of Ohio is set forth in Appendix C. The notice of appeal was filed April 12, 1962 in the Supreme Court of the State of Ohio, and in the Court of Appeals of Cuyahoga County, State of Ohio, and in the Court of Common Pleas, County of Cuyahoga, State of Ohio.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257 (2)

(iv) Cases sustaining the jurisdiction of this Court are: *Mapp* v. *Ohio*, 367 U. S. 643; *Smith* v. *California*, 361 U. S. 147; *Alberts* v. *California*, 354 U. S. 476; *Burstyn* v. *Wilson*, 343 U. S. 495; *Lanzetta* v. *New Jersey*, 306 U. S 451.

(v) The validity of Section 2905.34 of the Revised Code of the State of Ohio is involved. The statute makes it a crime for any person "knowingly . . . (to) exhibit . . . or have in his possession or under his control an obscene . . . motion picture film." The text of Section 2905.34 is set forth in Appendix D.

(c) The Questions Presented by the Appeal.

(1) Whether Section 2905.34 of the Ohio Revised Code on its face and as applied in this case violates the Federal Constitutional guarantees of freedom of communication because it punishes the mere private possession of obscene material without regard to the nature and purposes of the possession.

(2) Whether Section 2905.34 of the Ohio Revised Code as interpreted and applied in this case violates the Federal Constitutional guarantees of freedom of communication because it provides for punishment of one who possesses or exhibits obscene material though he may not know the material is obscene, and may have cogent reason for believing that the material is not obscene.

(3) Whether the trial court in convicting Appellant, and the court below in affirming the conviction, of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those prescribed by this Court, and punished Appellant for dealing with a film within the protection of the First and Fourteenth Amendments of the Constitution.

(4) Whether Appellant was convicted and punished twice under Section 2905.34 for the same offense in violation of the guarantees of the Fourteenth Amendment.

(5) Whether Section 2905.34 as modified by related statutes denies equal protection of the laws and authorizes punishment without due process of law.

(6) Whether Section 2905.34 of the Ohio Revised Code on its face and as construed and applied in this case infringes the right of communication protected by the First and Fourteenth Amendments and is void for vagueness

under the Due Process Clause of the Fourteenth Amendment in making it a felony knowingly to possess or exhibit an "obscene" motion picture.

(d) The Material Facts of the Case.

Appellant was indicted and convicted of possessing and exhibiting "The Lovers", an allegedly obscene motion picture film. The film was shown at the Heights Art Theater in Cleveland Heights, Ohio. Appellant was employed as manager of the theater by its owner. Appellant did not choose or "book" "The Lovers" or any other feature film for the Heights Art Theater.

"The Lovers" was produced in France. Although it was the subject of controversy, the film was acclaimed as a work of art by several motion picture critics and received one of the principal awards at the Venice Film Festival of 1959 and at a film festival in Brazil. The New York Times listed the film as one of the ten best of the year 1959. The story of the film is that of a woman who sacrificed husband, child, home, comfort, security and social position for an uncertain life with a young archaeologist with whom she had fallen completely in love.

Before the film was imported into the United States it was examined by the Customs authorities in New York and in Washington, D. C. The Bureau of Customs ruled that the film is "not obscene within the meaning of Section 305 of the Tariff Act." The film was shown in theaters in approximately 100 cities in the United States, including Louisville, Kansas City, Memphis, San Francisco, Los Angeles, New York, Washington, Boston, Detroit, Denver, Houston and Dallas, before it was sent to the appellant. The film was also shown in Columbus, Ohio and in Toledo, Ohio without interference. Later exhibitions in Dayton and Cleveland were stopped by police action.

The Judges of the Supreme Court of Ohio viewed the film and the majority opinion described it as "87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity." The majority of the Ohio Supreme Court also found that the picture "The Lovers" was *not* "hardcore pornography, i.e., filth for filth's sake. It was worse. It was filth for money's sake", and the court concluded that the "producers, distributors and exhibitors evidenced so little responsibility . . . that they have no right to assert constitutional guaranties . . ." 173 Ohio St. at p. 28 (App. A, p. 7a).*

How the federal questions were raised

The federal questions sought to be reviewed (other than Question 3) were raised on the argument of a demurrer to the indictment at the commencement of the trial in the Court of Common Pleas of Cuyahoga County (Criminal Division) (R. 20-35, 54).** The demurrer was overruled (R. 63). The pertinent language of the trial court's decision in favor of the validity of the challenged statute is as follows:

> "This trial court unanimously agrees that it is bound by the case of the State of Ohio *vs.* Dollree Mapp, 170 O. S. 427, and by the appeal decision therein, in which the constitutionality of Revised Code 2905.34 is upheld * * *." (R. 63)

Question 3 was raised when the issue was presented, at the conclusion of the trial, on argument to the trial court.

---

* All references preceded by "App." are to the pages of the appendix to this Jurisdictional Statement.

** All references preceded by "R" are to the pages of the Bill of Exceptions included in the Record on Appeal from the Court of Common Pleas. The pagination referred to is in the upper right corner of each page.

Question 4 was also raised by means of a motion to quash the indictment, which was denied (R. 63).

The questions sought to be reviewed were argued on the appeal to the Court of Appeals of Cuyahoga County and by assignment of error on the appeal to the Supreme Court of Ohio. (Transcript of Record in the Supreme Court of Ohio, pp. 15-18.) The decisions in the appellate courts were also in favor of the validity of Section 2905.34. Questions 2 and 3 were decided in the majority opinion of the Supreme Court of Ohio; question 1 was also discussed in Judge Taft's concurring and dissenting opinion.

(e) The questions presented are substantial.

This appeal presents several constitutional questions, substantial in character. The validity of a state statute affecting the right of communication is drawn into question and, it is submitted, the Appellant's Federal Constitutional rights were violated by the enforcement of the statute. This Court in other cases recognized the substantiality of several of the questions raised here, but left them undetermined.

This appeal presents the question of whether a statute punishing the mere possession of obscene literature, violates the First and Fourteenth Amendments. That question, involving the same statute challenged on this appeal, was presented and considered by this Court in *Mapp* v. *Ohio,* 367 U. S. 643, but the question was not decided.

Another question presented by this appeal is whether this Court is bound by a revised construction of a state statute given by the highest court of the state *after* an accused was convicted. The construction given after the conviction was contrary to an earlier construction given by the same court, although the earlier construction had been adopted and followed by the trial court in which the

accused was convicted. Similar questions were presented in *Cole* v. *Arkansas*, 338 U. S. 345 and *Winters* v. *New York*, 333 U. S. 507. In *Cole* v. *Arkansas* the question presented was whether a state statute was unconstitutionally vague where the trial court in which a defendant was found guilty, and the appellate court, in which his conviction was sustained, were at odds in their interpretation of the statute. This Court found it unnecessary to decide that question, the case having been disposed of on other grounds (338 U. S. at 354). In *Winters* v. *New York*, 333 U. S. 507 one of the questions presented, and left unanswered, was whether a defendant was chargeable with knowledge of a later interpretation of a statute by the highest court of the state, made after the defendant's conviction. The question presented here embraces but is broader in import than those presented in the *Cole* and *Winters* cases, for in the case at bar the highest court of the state gave one interpretation of the statute shortly before Appellant's trial and an inconsistent interpretation on the appeal from Appellant's conviction.

Another question here presented was posed in the opinion of this Court in *Smith* v. *California*, 361 U. S. 147, at 154, namely the extent of the knowledge of obscenity on the part of an accused that a statute punishing the distribution of obscenity must require in order to meet Federal Constitutional demands.

This case also presents questions that arise as a result of this Court's opinion in *Roth* v. *United States*, 354 U. S. 476. In the *Roth* case the Court ruled that in judging whether a work is obscene "contemporary community standards" must be applied (354 U. S. at 489). One of the questions here presented is whether the term "community" was intended to include the people within the city or county in which the accused is prosecuted, or the people within a

state, or the people of the United States? Another question presented is whether this Court intended by its opinion in *Roth* (354 U. S. at 485), to free serious artistic endeavor and accomplishment from censorship.

Each of the questions here presented, those outlined in the preceding paragraphs and others referred to hereafter, relate to the fundamental right of expression, and each of the questions is of sufficient public importance to merit plenary consideration.

1. Section 2905.34 of the Ohio Revised Code on its face and as applied in this case violates the Federal Constitutional guarantees of freedom of communication because it punishes the mere private possession of obscene material, without regard to the nature and purposes of the possession.

The Appellant was charged with violation of Section 2905.34 of the Ohio Revised Code. That Section provides that "No person shall knowingly . . . exhibit . . . or have in his possession or under his control an obscene, lewd or lascivious . . . motion picture film". The Defendant was indicted and convicted on two separate counts, one count was for possessing the film "The Lovers" and the other count was for exhibiting it.

The trial of the charges against Appellant began May 23, 1960. Two months before that date the Ohio State Supreme Court construed Section 2905.34 of the Ohio Revised Code as making criminal the mere possession of obscene material *without* regard to the purpose of the possession, or the manner in which the material came into defendant's possession, or whether the accused had an opportunity to rid himself of the material. *State* v. *Mapp*, 170 Ohio St. 427. The majority of the Ohio Supreme Court in *State* v. *Mapp* were also of the opinion that Section 2905.34 as construed, infringed the constitutional right of free press because it might "discourage law abiding people from even

looking at books and pictures and thus interfere with the freedom of speech and press guaranteed by Articles I and XIV of the Amendments to the Constitution of the United States", 170 Ohio St. at p. 432. Judge Herbert, in a separate opinion in *State* v. *Mapp* wrote: "I cannot agree that mere private possession of such literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual." (170 Ohio St. at p. 437.)

The statute, Section 2905.34, was not adjudged invalid in *State* v. *Mapp*, 170 Ohio St. 427 because the Ohio Constitution requires a concurrence of six of the seven Judges of the Ohio Supreme Court in the finding of unconstitutionality before a statute may be judicially determined invalid, and a minority of three Judges of the court did not concur in that opinion of the majority. However, the construction of the statute in *State* v. *Mapp*, 170 Ohio St. 427 became the authoritative interpretation of the statute. It was controlling in the State of Ohio and was deemed binding on this Court (See dissenting opinion of Mr. Justice Harlan in *Mapp* v. *Ohio*, 367 U. S. 643 at 675).

An appeal from the judgment in *State* v. *Mapp*, 170 Ohio St. 427 was taken to this Court; and the "pivotal" issue on the appeal was the constitutionality of the provision of Section 2905.34 making "*mere* knowing possession and control of obscene material" a penal offense, *Mapp* v. *Ohio*, 367 U. S. 643 at 672 (dissenting opinion of Mr. Justice Harlan). This Court noted probable jurisdiction, 364 U. S. 868 but after argument reversed on other grounds, *Mapp* v. *Ohio*, 367 U. S. 643. The question under discussion was

thus left undetermined by this Court in *Mapp* v. *Ohio* but Mr. Justice Stewart in his concurring opinion in that case said: "I am persuaded that the provision of Section 2905.34 of the Ohio Revised Code upon which petitioner's conviction was based, is in the words of Mr. Justice Harlan, not consistent 'with the right of free thought and expression assured against State action' by the Fourteenth Amendment." 367 U. S. at 686.

After Appellant was convicted, the Ohio Supreme Court, on the appeal from Appellant's conviction, revised its interpretation of Section 2905.34 and ruled (in direct contradiction of its opinion in *State* v. *Mapp*, 170 Ohio St. at p. 432) that a wrongful purpose *is* an essential element of the crime defined by the statute and that wrongful possession of obscene matter is punishable only if such wrongful possession is with "a guilty or wrongful purpose" . . . "to use, exhibit or sell it wrongfully". 173 Ohio St. at p. 27 (App. A, pp. 6a-7a).

Judge Taft in his opinion in the court below in this case, noted that the statute was not capable of the changed construction for before 1939 the statute specifically provided for punishment of possession of obscene matter if the possession was for the purpose of sale, and the clause in the statute relating to the purpose of possession was stricken from the statute by the Ohio Legislature in 1939. Judge Taft also observed in his opinion in the court below that the changed interpretation of the statute "would be helpful" in avoiding a review by this Court. 173 Ohio St. at p. 30 (App. A, p. 10a).

Whether the new interpretation of Section 2905.34 is binding in the future, it cannot be given retroactive effect in this case. We believe this Court is for the purposes of this case, bound by the construction of the statute of the Supreme Court of Ohio in effect when the Appellant was tried. A statutory crime may not be re-defined by an

appellate court, after a defendant has been found guilty, in order to validate the conviction, *Lanzetta* v. *New Jersey*, 306 U. S. 451. The state of the law at the time of the commission of the alleged offense must be held to govern. In this case the indictment was framed under the construction enunciated in *State* v. *Mapp*, 170 Ohio St. 427 (without reference to any alleged wrongful purpose of possession), and the trial court stated that it was ruled by the opinion in that case.

It is the general rule that an interpretation of a statute by the highest court of a State shall be read into the statute as if so amended by the legislature, *Hebert* v. *Louisiana*, 272 U. S. 312, 317. But as a legislature's amendment of a criminal statute charging the ingredients of the crime may not be given retroactive effect (for that would be repugnant to Section 10 of Article I of the Constitution) such retroactive amendment may not be made by judicial fiat.

The attempted change by the Ohio Supreme Court in the elements of the crime of which Appellant was convicted would, if countenanced, deny Appellant due process of law. A penal statute must state precisely what conduct is prohibited so that a person may know in advance what actions are proscribed and what defense may be interposed. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. A retroactive change in the definition of a statutory crime after one has been convicted of committing it, denies both the opportunity to avoid offending the law, and the opportunity to prepare the defense against the charge of violating it.

2. Section 2905.34 of the Ohio Revised Code as interpreted and applied in this case violates the Federal Constitutional guarantees of freedom of communication because it provides for punishment of one who possesses or exhibits obscene material though he may not know the material is obscene, and may have cogent reasons for believing that the material is not obscene.

The question here presented is one that this Court posed but left undetermined in *Smith* v. *California*, 361 U. S. 147. The Court ruled in *Smith* v. *California*, that an ordinance making the offering of obscene material for sale a crime, is in conflict with the Constitution if it does not require the showing that the bookseller was aware of the nature of the material offered. See also *Lambert* v. *California*, 355 U. S. 225; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 237; *Wieman* v. *Updegraff*, 344 U. S. 183, 191. Such ordinance, the Court held, tends to restrict the sale and distribution of constitutionally protected expression by placing an almost insupportable burden on the bookseller.

The *Smith* case involved a statute that completely eliminated the requirement of *scienter* and imposed a strict criminal liability on the store owner possessed of an obscene book whether or not he was aware of its content. It was therefore unnecessary in that case to determine as Mr. Justice Brennan wrote for the Court " . . . what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." (361 U. S. at p. 154).

Section 2905.34 of the Ohio Revised Code as interpreted and applied in the instant case, required the conviction of one accused of holding and exhibiting a film thereafter found obscene by the court, although the accused had good reason to believe that the film did not offend the law. According to the undisputed evidence in this case there had been a determination by the United States Customs Bureau that the film "The Lovers" is "not obscene". Also, as Appellant knew, the film was shown publicly and was widely reviewed and was found acceptable in a number of cities in the United States before it was forwarded to Appellant. The challenged statute, as it was applied in this case, required Appellant to make an independent judgment contrary to that reached by a government agency, and contrary to that apparently reached in other parts of the United States.

Section 2905.34, thus interpreted and applied, though aimed at the repression of obscene material, also inhibits constitutionally protected expression. Under the statute, the owner or employee of a theater who is offered a film for exhibition, and who concludes that it is not obscene, may be guilty of a crime during the period he holds the film privately, and again when he exhibits it, though the conclusion that the film is not obscene is a reasonable one supported by and also reached by a department of the government required to make such determinations, and by a number of the local enforcement agencies in other states and cities. To avoid that risk, the theater owner or manager will tend to restrict the motion pictures shown at his theater to those that are "absolutely safe" and to which no objection may be taken. If Appellant's conviction in this case was authorized by Section 2905.34, the statute must be held to violate the First and Fourteenth Amendments because of its tendency to suppress constitutionally

protected expression. See *Smith* v. *California*, 361 U. S. 147.

3. The trial court in convicting Appellant, and the court below in affirming the conviction, of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those outlined in *Alberts* v. *California*, 354 U. S. 476 and punished Appellant for dealing with a film within the protection of the First and Fourteenth Amendments of the Constitution.

The court below after discussing differences in the proof of *scienter* required where the material dealt with is "hard-core pornography" and where the material in question has "theoretically" a serious artistic purpose, 173 Ohio St. at pp. 26-8 (App. A, pp. 5a-7a), acknowledged that the film involved in this case, "The Lovers", "is not hard-core pornography". 173 Ohio St. at p. 28 (App. A, p. 7a). The court below also found 87 minutes of the film vapid and boring, and 3 minutes of it completely revolting. 173 Ohio St. at p. 28 (App. A, p. 7a). The Ohio State Supreme Court also found that though the film was not "hard-core pornography" it was commercially exploited "filth", and that the exhibitor by showing it, evidenced so little responsibilitiy that he had "no right to assert constitutional guaranties which require a high degree of responsibility from those who seek their protection". 173 Ohio St. at p. 28 (App. A, p. 7a).

We do not think it necessary to comment on the dictum that one must exercise a high degree of responsibility before invoking a constitutional right. It is clear also that the derivation or expectation of economic gain from a communication does not affect its right to the protection of the Constitution or the question of whether it is obscene. *Burstyn* v. *Wilson*, 343 U. S. 495, 501-502.

The prescribed standards for determining whether a work is obscene are set out in *Roth* v. *United States*, 354 U. S. 476. If a film is suppressed as obscene and it does not fall within the definition of that term outlined in *Roth*, the First Amendment right of communication is violated. *Smith* v. *California*, 361 U. S. 147, 152; *Burstyn* v. *Wilson*, 343 U. S. 495. This Court indicated in *Roth, supra* and in later cases, its intent to limit the material that may constitutionally be suppressed as obscene, to "hard-core pornography". See *Roth* v. *United States*, 354 U. S. 476, at 485; *One, Inc.* v. *Oleson*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35; Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 32-35; Lockhart and McClure, Obscenity Censorship: The Constitutional Issue—What is Obscene, 7 Utah L. Rev. 289, 295.

Since, as the court below conceded, the film "The Lovers" may not be considered "hard-core pornography" the appellant's convictions for possessing and showing it must be held a violation of his rights under the Fourteenth Amendment. We believe that a viewing of the film will convince this Court that the picture may not be considered obscene under any constitutionally permissible test.

We believe that the court below erred also in judging "The Lovers" by the effect of an isolated portion, contrary to the rule laid down in *Roth* v. *United States*, 354 U. S. at 489. See also *Grove Press, Inc.* v. *Christenberry*, 276 F. 2d 433, 437. If more than 96% of the film was deadly dull, as the Ohio Supreme Court indicated, then its "dominant effect" cannot be described as "having a tendency to excite lustful thoughts",—the test of obscenity enunciated in *Roth* v. *United States*, 354 U. S. at 486, 489.

Roth v. United States also requires a Court, in determining whether a work is obscene, to judge it in accordance with contemporary community standards (354 U. S. at 489). The term "community" is not defined in *Roth*, but it is clear that this Court did not intend the consideration of the singular standards of the people of a city, township or county. For the requirement of conformity to the different standards of each city and each rural area of a state would impose an undue burden on the distribution or dissemination of communications.

The trial court in this case did not indicate and the record does not disclose the geographical area or segment of the population the trial Judges had in mind when they declared that in evaluating the film they applied "community" standards (App. B, p. 12a). It is clear, however, that the trial court attempted to apply local standards that could not constitutionally, serve as a guide. The standards of the people of the State were not applied, for it will be recalled that the film was publicly shown in Toledo, Ohio and in Columbus, Ohio and there was no prosecution of, or interference with, the exhibition in those cities. It is also clear that the standards of the people of the United States were not applied, for the film was licensed for exhibition and shown in the State of New York and the Customs Bureau (presumably applying the standards of the nation) found the picture "not obscene".

The court below also failed to consider the artistic merit of the film. The excellence of the direction, acting and photography, have been generally acknowledged by those qualified to make such judgments. A work of such social value may not be banned as obscene, *Roth* v. *United States*, 354 U. S. at 484, 487. Kalven, Metaphysics of The Law of Obscenity, in The Supreme Court Review 11-13 (Univ. of Chicago Press, 1960).

4. Appellant was convicted and punished twice under Section 2905.34 for the same offense in violation of the guarantees of the Fourteenth Amendment.

Appellant was charged with, and convicted of, and separately punished for two alleged offenses, one for possessing and the other for exhibiting an obscene film. As the crimes are defined in the statute, one cannot be guilty of feloniously exhibiting an obscene picture without being guilty also of felonious possession of the picture. The application of Section 2905.34 in this case resulted in Appellant's being convicted and punished twice for the same offense in violation of the due process clause of the Fourteenth Amendment, *Ex parte Lange*, 85 U. S. 163; *In re Nielson*, 131 U. S. 176. The multiplication of convictions and punishments for a single act of exhibiting a motion picture also tends to restrict the right of communication by increasing the risks to which distributors and exhibitors of films and their employees are exposed. The construction and application of the statute Section 2905.34 in this case is inconsistent with the guarantees of the Fourteenth Amendment. See *Smith* v. *California*, 361 U. S. 147.

5. Section 2905.34 as modified by related statutes denies equal protection of the laws and authorizes punishment without due process of law.

Though Section 2905.34 on its face seemingly applies uniformly to all persons knowingly possessing or exhibiting "obscene" matter, a consideration of the related Sections 3767.01 (c) and 2905.37 of the Revised Code reveals that that is not so. As modified by the cited statutes, Section 2905.34 declares it a felony for any person knowingly to possess or to exhibit "obscene matter" unless the material

was "entered" as second class matter in the post office* or unless the material is a "work of art" distributed by a non-profit association of artists or for the advancement of art.** The constitutionality of Section 2905.34 must be measured as thus modified. *Jones* v. *Opelika*, 316 U. S. 584, 600, dissenting opinion, adopted by the Court on rehearing, 319 U. S. 103. So considered, Section 2905.34 is arbitrary and unreasonable in violation of the equal protection clause of the Fourteenth Amendment.

The issuance of a second-class mailing permit is not a guarantee that the holder will not thereafter enter obscene photographs or other obscene material. It is also difficult to understand why matter sent under first and third-class mail is not placed in the same category as material entered as second-class matter. And there is no assurance that any material considered a "work of art"*** by "an association of artists" or an "association for the advancement of art"*** will not be obscene or that it will have social value or artistic merit. See *Roth* v. *United States*, 354 U. S. at 485. The discrimination in favor of associations of self-styled artists and persons who receive obscene matter sent under second-class permit is completely unreasonable and bears no relation to the purpose of Section 2905.34. *City of Cincinnati* v. *King*, 11 Ohio Ops. 2d 433.

---

* Section 3767.01 (c) (in effect at the time of Appellant's conviction); App. D, p. 16a.

** Section 2905.37; App. D, p. 15a.

*** The terms "work of art" and "association of artists" are such vague terms requiring subjective determination that arbitrary enforcement of the provise seems inevitable.

6. Section 2905.34 of the Ohio Revised Code on its face infringes the right of communication protected by the First and Fourteenth Amendments and is void for vagueness under the Due Process Clause of the Fourteenth Amendment in making it a felony knowingly to possess or exhibit an "obscene" motion picture.

The prevailing opinion in this Court, as expressed in *Roth* v. *United States, supra,* is that a criminal prohibition against "obscenity" does not violate the right of communication and that the word "obscene" as used in a criminal statute is not unconstitutionally vague. The record in this case furnishes occasion for reconsideration of those rulings. See *Smith* v. *California,* 361 U. S. 147, 155, 167 (concurring opinions of Mr. Justice Black and Mr. Justice Douglas).

June 6, 1962

Respectfully submitted,

EPHRAIM LONDON,
Attorney for Appellant.

BENNET KLEINMAN, ESQ.,
of Counsel.

On the Statement
EPHRAIM LONDON,
LOUIS LAUER,
JORDAN DERWIN.

APPENDIX A

Majority Opinion of The Supreme Court of Ohio and Concurring and Dissenting Opinion.

SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

v.

NICO JACOBELLIS,
Defendant-Appellant.

(No. 37200—Decided January 17, 1962.)

CERTIFIED by the Court of Appeals for Cuyahoga County.

Defendant was indicted on two counts by the September 1959 Grand Jury of Cuyahoga County, Ohio, for violation of Section 2905.34, Revised Code. The first count in the indictment reads as follows:

"* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly had in his possession and under his control a certain obscene, lewd and lascivious motion picture film, to wit:

"(Les Amants) 'The Lovers'

"Said motion picture film being so indecent and immoral in its nature that the same would be offensive to the court, and improper to be placed upon the records thereof * * * and against the peace and dignity of the state of Ohio."

The second count in the indictment reads:

"* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly exhibited a certain obscene, lewd and lascivious motion picture film, to wit:

"(Les Amants) 'The Lovers'

"Said motion picture film being so indecent and immoral

in its nature that the same would be offensive to the court, and improper to be placed upon the records thereof • • • and against the peace and dignity of the state of Ohio."

Section 2905.34, Revised Code, so far as it pertains to the defendant and his conduct on November 13, 1959, reads as follows:

"No person shall *knowingly* • • • exhibit • • • or have in his possession or under his control an obscene, lewd, or lascivious • • • motion picture film • • •.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both." (Emphasis added.)

Upon arraignment the defendant entered pleas of not guilty to both counts of the indictment on November 30, 1959, and was released on bond.

On May 23, 1960, the defendant waived his right to trial by jury, both orally and in writing, and requested trial by a three-judge court. He was permitted to withdraw his pleas to make certain motions; thereafter the pleas of not guilty were re-entered and trial was had, resulting in a finding of guilty as charged in each count of the indictment.

The defendant was sentenced to pay a fine in the sum of $500 on the first count of the indictment and sentenced to pay a fine of $2,000 on the second count of the indictment and to stand committed to the workhouse of the city of Cleveland until such fine and costs were paid. Sentence was stayed pending appeal.

On appeal to the Court of Appeals, that judgment was affirmed.

The cause is before this court pursuant to a certification of the record, the Court of Appeals finding its judgment to be in conflict with the judgment of the Court of Appeals of the Third Appellate District in the case of *State* v. *Wetzel*, decided December 10, 1960.

RADCLIFF, J. At the outset it is well to recall that an opinion of this court does not necessarily reflect the thinking and logic, if any, of any member of the court other than the author. It is the means by which the author of an opinion, in this case the writer, illustrates the path followed to reach a conclusion which, if concurred in by a majority of my distinguished colleagues (this term is used in all humility as my status as such is only temporary), is stated in the syllabus as the law of the case.

The defendant urges five assignments of error, the first two raising the constitutional issues involved. The third and fourth emphasize facts and the weight of the evidence, which we shall dispose of in the perfunctory manner, as the law requires of this court, in a short paragraph later in this opinion. The final assignment of error raises the question of general prejudice.

There is an oft-quoted cliche to the effect that "it is not possible to legislate in the field of morals." The statement originally was and still should be, "it is not possible to legislate morality for the people." In support of this, there is always cited the classic example of the Eighteenth Amendment to the United States Constitution. We sorrowfully agree that this is true, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to try. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fiber resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to re-elect or by direct referendum. It is infelicitous for the judicial branch of the government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure or mode of selection, con-

sequently its authority must be exercised with deliberate caution. *Lex citius tolerare vult privatum damnum quam publicum malum.*

We turn now to a consideration of the provisions of Section 2905.34, Revised Code, in relation to the various pronouncements of the Supreme Court of the United States in interpreting such statutes. The pertinent part of Section 2905.34, Revised Code, with which we are presently concerned, reads as follows:

"No person shall *knowingly* sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene * * * motion picture film * * *." (Emphasis added.)

At the outset it must be noted that the Supreme Court of the United States has held that obscenity is not protected by the constitutional provisions relating to freedom of speech. *Roth* v. *United States*, 354 U. S., 476, 1 L. Ed. (2d), 1498, 77 S. Ct., 1304.

In *Smith* v. *California*, 361 U. S., 147, 4 L. Ed. (2d), 205, 80 S. Ct., 215, however, the Supreme Court struck down a state statute which imposed strict criminal liability for the mere possession for sale of an obscene book, without requiring any knowledge of the contents of the book. The case reserved, however, the question as to the extent of knowledge required which would validate such a statute.

Such infirmity does not exist in the statute under our consideration. It is specifically required under Section 2905.34, Revised Code, that the acts punished thereunder shall be done knowingly. The act requires knowledge. The question, of course, is knowledge of what. It is apparent that such knowledge must necessarily relate to knowledge of the obscenity of the contents of the publication involved.

Two questions must be determined at this time. First, the test as to what is obscene. The definition which has now become classic was laid down in *Roth* v. *United States*, *supra*, as follows, at page 489:

"* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Thus it is to be seen that the test for obscenity is not subjective but objective. It is not to be judged by what any single individual deems is obscene to himself, but rather what the community as a whole would consider obscene. There is no real or actual ambiguity in the phrase. No undue burden is placed on the possessor of such literature, for even though the individual himself might not consider the subject matter obscene, it is indeed the isolated and uninformed person who would not know as a matter of fact what is obscene by the usual community standards, and as stated in *Roth* v. *United States, supra,* at pages 491 and 492:

"Many decisions have recognized that these terms of obscenity statutes are not precise. This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' *United States* v. *Petrillo,* 332 U. S., 1, 7-8 [91 L. Ed., 1877, 67 S. Ct., 1538]. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *.'"

The second question which arises is as to what extent a person is bound to have knowledge of the contents of that which he possesses. To the dealer in what is commonly known as hard-core pornography there is little question. Such purveyors of obscenity can be presumed to know what they are dispensing. (*State* v. *Wetzel,* 173 Ohio St., 16.) It is in the more ethereal region of theoretical literary endeavor that the principal problem arises. Here, once again, the community must be the test. A commercial possessor obviously can not be held to the duty of examining and determining for himself the obscenity of all matters which pass

through his hands, neither, however, can he profess ignorance of that which has become a matter of general knowledge in the community. The rule of reason must be applied in these matters. While the possessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene as judged by the above test, then the duty devolves upon the holder of such publications to refrain from distributing or exhibiting them and to destroy them as soon as he may practically do so; otherwise he will then become guilty under Section 2905.34, Revised Code.

Thus it is only when a holder of such matter becomes aware of or should be aware of the contents and the objectionable nature thereof that he would become liable to prosecution under this section.

That there are marginal cases where such determination is difficult does not invalidate an otherwise valid enactment. *Roth* v. *United States*, *supra*, and *State* v. *Wetzel*, *supra*.

The final question that must be disposed of in relation to this section is the proper construction of the phrase, "in his possession or under his control," and its relationship to the rest of the section. Does such phrase relate to the mere private possession by an individual of such matter for his own personal gratification? If so, such section might well be held to be invalid. However, in our opinion, such is not the proper construction of this section, nor does it give effect to the apparent intention of the General Assembly.

It requires only a cursory examination of this section to determine that its language clearly relates to the circulation, publication and exhibition of obscene matter. In other words, to the dissemination of obscenity, whether for profit or otherwise. Under the doctrine of *noscitur a sociis* the phrase, "in his possession or under his control," must be read in context with the language used in the section as a whole.

In the phrase, "knowingly possess," as used in criminal statutes, is implicit not only the element of scienter but also the element of mens rea, namely, "a guilty or wrongful purpose." It is not conceivable to us that a violation of Section 2905.34 is committed the moment an individual dis-

covers that a book, picture or film in his possession is pornographic. He could only be said to violate the law when and if he forms the purpose to use, exhibit or sell it wrongfully, in other words, forms the mens rea and acts in furtherance thereof.

When this phrase is read in context with and in relation to the rest of the section, it is readily apparent that such phrase does not relate to the mere possession for private and personal gratification but rather to possession and control for the purpose of circulation or exhibition, a matter clearly within the power of the state to control under the police power.

The third and fourth assignments of errors raise questions as to factual issues and the weight of the evidence. These issues have been resolved in the proper forums. The facts were found by the three judges sitting as the triers of the facts who applied the standards prescribed in *United States* v. *Roth, supra,* and by the Court of Appeals which the law requires must pass upon the weight and sufficiency of the evidence.

This court viewed Les Amants (The Lovers). The film ran for 90 minutes. To me, it was 87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity. Les Amants (The Lovers) was not hard-core pornography, *i. e.*, filth for filth's sake. It was worse. It was filth for money's sake. The producers, distributors and exhibitors evidenced so little responsibility in connection therewith that they have no right to assert constitutional guaranties which require a high degree of responsibility from those who seek their protection. This is especially apropos of the First and Fourteenth Amendments to the Constitution of the United States.

There is a unique coincidence involving this case (*State* v. *Jacobellis*) and the case of *State* v. *Warth*, 173 Ohio St., 15, as the obscene material involved in both was Les Amants (The Lovers). However, the statute involved in each case is entirely different. Jacobellis was indicted, tried and convicted for violation of Section 2905.34, Revised Code.

Warth was indicted, tried and convicted for violation of Section 2905.342, Revised Code. The latter statute attempted to make *mere* possession or exhibiting an obscene motion picture film a misdemeanor. In view of the pronouncements of this court in *City of Cincinnati* v. *Marshall*, 172 Ohio St., 280, 175 N. E. (2d), 178, and of the Supreme Court of the United States in *Smith* v. *California, supra*, and our high regard for the doctrine of *stare decisis*, the conviction of Warth was reversed due to the constitutional infirmity of Section 2905.342, Revised Code, in omitting the element of scienter or knowledge. The cases in reality had no common principle of law involved, and, consequently, the different conclusion reached in each can not provoke any possible question of inconsistency. Had Warth been charged in Montgomery County with a violation of Section 2905.34, Revised Code, he would have been as guilty as we now find Jacobellis in Cuyahoga County.

As we find no error in the judgment of the Court of Appeals, such judgment is hereby affirmed.

Judgement affirmed.

ZIMMERMAN, acting C. J., MATTHIAS, BELL and O'NEILL, JJ., concur.

HERBERT, J., dissents.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C. J.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of ZIMMERMAN, J.

TAFT, J., concurring in part. I cannot be as positive in condemning the film involved in the instant case as the majority opinion is. However, in my opinion, reasonable minds could determine beyond a reasonable doubt that this film is, to use the words of the statute, "obscene, lewd, or lascivious."

I agree, therefore, with the judgment so far as it relates to the second count of the indictment charging defendant with exhibiting that film.

I also agree with the majority opinion that the word "knowingly" in the statute relates not merely to possession and control of the film but also to what is in the film.

However, I cannot agree with the judgment of this court, to the extent that it affirms the conviction of defendant on the first count charging defendant merely with knowingly possessing and having control of the film.

It is my opinion, as it was the opinion of Judges Bell, Peck, Herbert and myself in *State* v. *Mapp* (1960), 170 Ohio St., 427, 433, 166 N. E. (2d), 387, that the portion of the statute upon which the first count is based is constitutionally invalid. As stated in the opinion in that case:

> "If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime * * *. As a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded."

Likewise, under this statute, if anyone looks at a movie film that he has lawfully acquired to determine whether he should exhibit it and finds it to be obscene, he is forthwith and at that instant guilty of a serious crime. As a result, some who might otherwise look at movie films that are not obscene to determine whether they should exhibit those films may well be discouraged from doing so and free circulation and exhibition of movie films will be impeded.

If Section 2905.34, Revised Code, providing that "no person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious * * * motion picture film" were reasonably susceptible of interpretation as a prohibition of possession or control of such a film only where such possession or control was for the circulation or exhibition thereof, I could also concur in the judgment so far as it affirms the conviction on the first count. Apart from some consideration of the legislative history of this statute, this court *might* be justified in proclaiming that there was a legislative intent that the "possession * * * or control," in order to be a crime, must be, to use the words

of the majority opinion, "for the purpose of circulation or exhibition." But compare *State* v. *Warth*, 173 Ohio St., 15. As the majority opinion states, this matter is clearly within the power of the state to control under the police power.

It may be observed that it is probable that such a judicial proclamation of legislative intent would be helpful, if not conclusive, in avoiding a review by the United States Supreme Court of the constitutional validity of this portion of our statute.

However, the General Assembly has quite clearly indicated that it had no such intention. Thus, prior to 1939, the foregoing statute (then Section 13035, General Code) read so far as pertinent:

> "Whoever sells, lends, gives away [*i. e.*, circulates], exhibits * * * or has in his *possession for such purpose*, an obscene [etc.]." (Emphasis added.)

In that year, the General Assembly amended that statute by taking out the words "for such purpose" appearing after the word "possession," and added, after the latter word, the words "or has under his control." 118 Ohio Laws, 420.

The General Assembly thus quite clearly expressed a legislative intention not to modify the words "has in his possession or under his control" as the majority opinion and the decision in the instant case are modifying those words.

APPENDIX B.

Memorandum Opinion of Court of Common Pleas, Criminal Division.

Before William J. McDermott, P. J., Roy F. McMahon, J., and John Pincura, J., (Pincura, J., Court of Common Pleas (Lorain County) sitting by designation in Cuyahoga County).

Per Curiam

The defendant was indicted on two counts under the provisions of Section 2905.34 of the Revised Code in that he (1) unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious motion picture film, to-wit: "*Les Amants*" (or The Lovers), and (2) unlawfully and knowingly exhibited a certain obscene, lewd, and lascivious motion picture film, to-wit: "*Les Amants*" (or The Lovers.)

At the request of the defendant the cause was tried before a court of three judges under Section 2945.07 of the Revised Code. Waiver of trial by jury was made in open court, in writing, signed by the defendant, filed in this cause and made a part of the record, all in accordance with the provisions of Section 2945.05 of the Revised Code.

In the motion picture "*Les Amants*" (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are por-

trayed to the senses of sight and hearing. After the narrative has reached this carefully built up and long-anticipated climax, it scurries to a hasty conclusion.

In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.

It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth* v. *United States*, (June 24, 1957) 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304. *"Les Amants"* (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film.

Therefore, the Court finds the defendant guilty as charged in both counts of the indictment.

WILLIAM J. MCDERMOTT,
Presiding Judge.

ROY F. MCMAHON,
Associate Judge.

JOHN PINCURA,
Associate Judge.

APPENDIX C.

Order Appealed From.

SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO }
CITY OF COLUMBUS }

1962 Term
To Wit Wednesday,
January 17, 1962

THE STATE OF OHIO,
Plaintiff-Appellee,

v.

NICO JACOBELLIS,
Defendant-Appellant.

No. 37200
Certified by
the Court of
Appeals for
Cuyahoga County

This cause, certified by the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is Ordered that no penalty be assessed herein.

It is further Ordered that the Plaintiff-Appellee recover from the Defendant-Appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX D.

Statutes Involved.

Ohio Revised Code Section 2905.34. "*Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes:*

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, of thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1961 Supplement, at p. 8.)

Ohio Revised Code Section 2905.342. *"Exhibition of obscene movies prohibited; movies inciting disorder or violation of laws prohibited:*

"No person shall produce, sell, lease, lend, give away, or distribute for the purpose of exhibition, or exhibit, or have in his possession or under his immediate control for any purpose:

"(A) An obscene motion picture film; or

"(B) Any motion picture film, the exhibition of which has created a public disorder, or from the exhibition of which a public disorder is imminent.

"The exhibition of a motion picture film which teaches or advocates that the violation of any of the criminal laws of the state of Ohio or any of the criminal laws of the United States of America is a proper or desirable course of conduct shall, prima facie, be deemed to create an imminent public disorder for the purpose of initiating the arrest of any person for the violation of this section.

"Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned not more than six months, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1961 Supplement, at p. 9.)

Ohio Revised Code Section 2905.37. *"Legitimate publications not obscene:*

"Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sec-

tions 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, at pp. 63-64.)

Ohio Revised Code Section 3767.01 (in effect at the time of Appellant's conviction). "*Definitions*:

"As used in all sections of the Revised Code relating to nuisances:

" 'Place' includes any building, erection, or place of any separate part or portion thereof or the ground itself;

"(B) 'Person' includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

"(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This section and sections 2905.34, 2905.35, 2905.37, and 2933.21 of the Revised Code shall not affect any motion picture film which has been approved by the division of film censorship or any newspaper, magazine, or other publication entered as second class matter by the post-office department."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Titles 37, 39, at p. 201.)